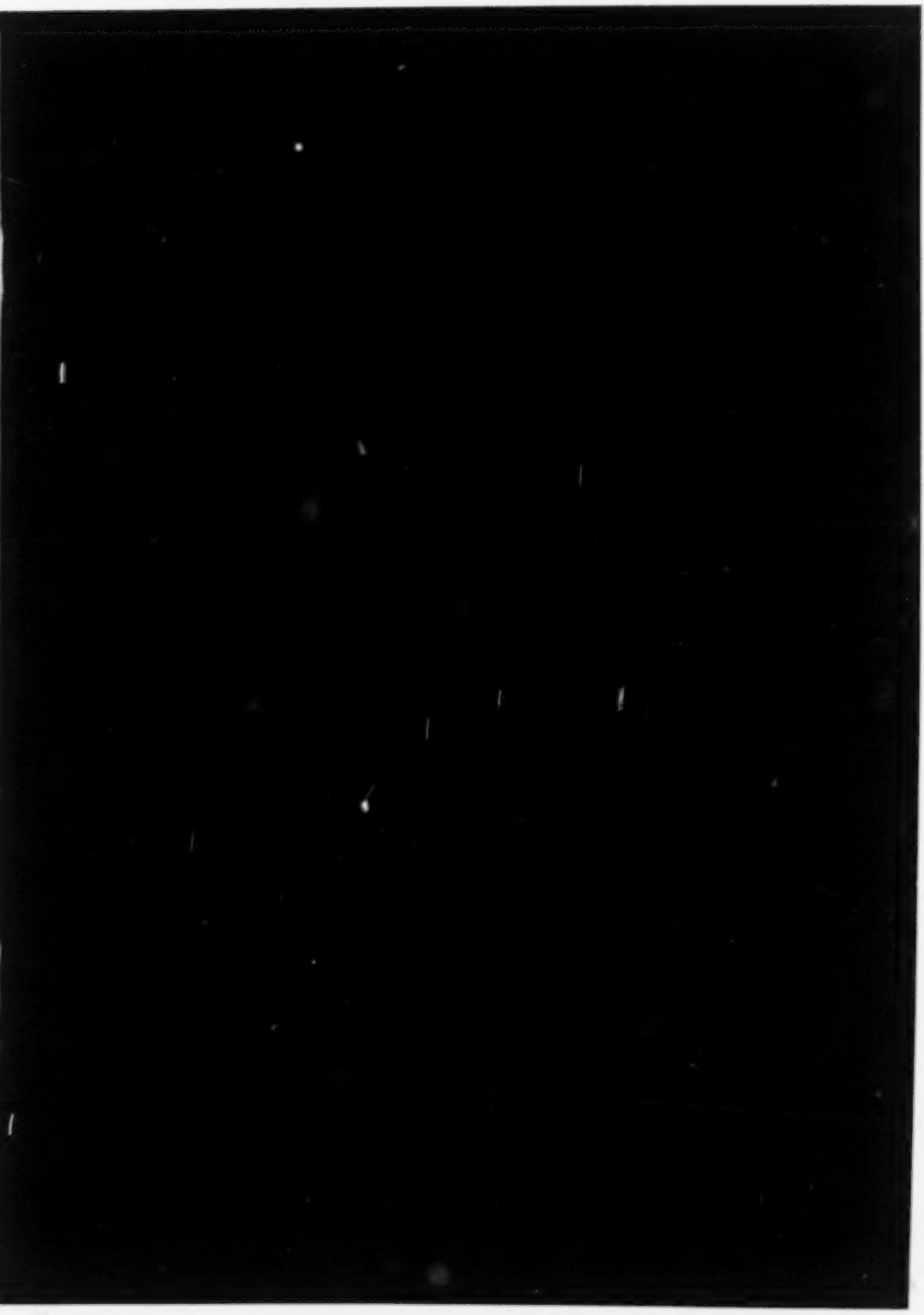

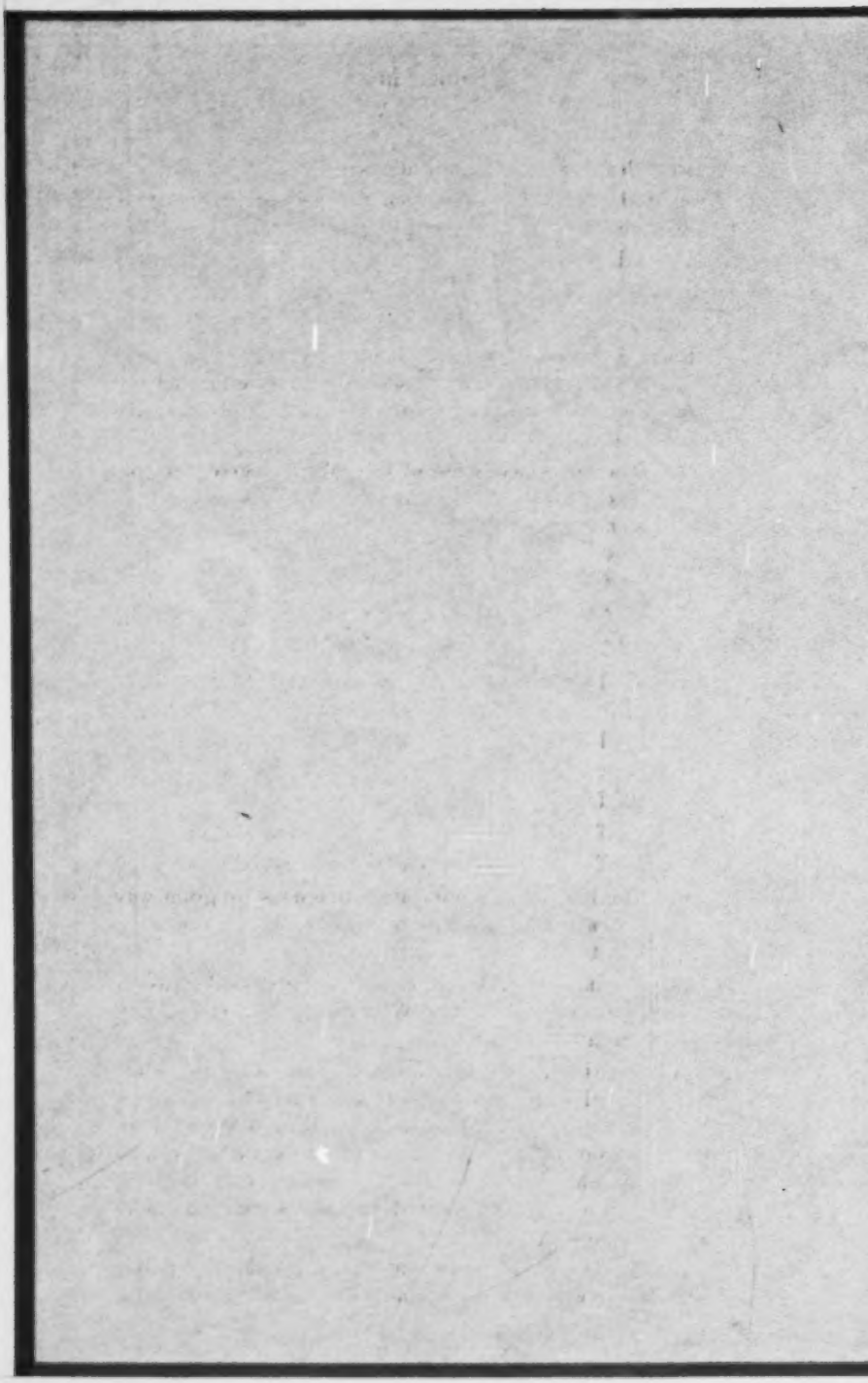

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IN THE

# Supreme Court of the United States

OCTOBER TERM 1973

No. 73-235

MARCO DEFUNIS, et al., *Petitioners,*

vs.

CHARLES ODEGAARD, President of the University of Washington, et al., *Respondents.*

**On Writ of Certiorari to the Supreme Court of the State of Washington**

## BRIEF OF THE LEGAL AID SOCIETY OF ALAMEDA COUNTY AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., AS AMICI CURIAE

### INTEREST OF LEGAL SERVICE ORGANIZATIONS

Legal Aid Society of Alameda County, Atlanta Legal Aid Society, Inc., Legal Aid Bureau, Inc. of Baltimore, Legal Aid Society of Cleveland, Hawaii Legal Services Project, Michigan Legal Services Assistance Program, National Employment Law Project, Community Legal Services, Inc. of Philadelphia, and Seattle Legal Services Center, are legal service organizations which provide legal assistance to low-income individuals. A high proportion of these clients

are members of racial minority groups. Amici have found that they are able to deliver more effective legal assistance to the individuals and communities they serve when the legal staff includes minority attorneys familiar with the problems and persons of the community. Many legal service attorneys, including some who have worked on the preparation of this brief, were admitted to law school through a minority admissions program. Such programs are essential if legal services and the entire legal profession are to achieve any meaningful level of integration.

Like the NAACP, legal service organizations are continually involved in efforts to combat the effects of racial discrimination in employment, housing, schools, and many other areas. We believe that progress in civil rights depends primarily upon the voluntary efforts of public and private organizations to rectify the widespread effects of racial discrimination. Racial discrimination, although often unintended, is so pervasive that the litigation process cannot be relied upon by itself to protect the rights of racial and ethnic minorities. For these reasons, we have been involved in the creation of numerous affirmative action programs, voluntarily adopted by public agencies, that use racial classifications to remedy racial discrimination. Reversal in this case would seriously jeopardize, if not destroy, these and future programs, to the severe detriment of our minority clients.

## INTEREST OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

The National Association for the Advancement of Colored People (NAACP) is a nonprofit membership association representing the interests of approximately 500,000 members in 1800 branches throughout the United States. Since 1909, the NAACP has sought through the courts to establish and protect the civil rights of minority citizens. In this respect, the NAACP has often appeared before this Court as an amicus in cases involving school desegregation, employment, voting rights, jury selection, capital punishment, and other cases involving fundamental human rights.

The present case is of particular importance to the NAACP because it centers around a public educational institution's efforts to cure voluntarily the effects of a racially discriminatory selection device. The NAACP has long encouraged private and public bodies to take such steps and has supported legislation designed to foster voluntary compliance with the law. The concern of the NAACP is that, should this Court rule in favor of the Petitioner; the concept of voluntary compliance will be wholly nullified, educational institutions attempting to "objectify" their selection procedures will be encouraged to intensify their reliance upon the paper qualifications of applicants; and such items as the Law School Admissions Test, college degrees, and grade point averages, will once again become "masters of reality." *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971). A foreseeable byprod-

uct of this process will be the resegregation of every public educational institution using such devices, as the record indicates will be the case with respect to the University of Washington Law School.

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## CONSENT OF THE PARTIES

With the consent of both parties pursuant to Rule 42 of the Supreme Court Rules, Amici respectfully submit this brief in support of Charles Odegaard, et al., Respondents.

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## INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case has repeatedly been characterized as one involving the legality of a "preference given on the basis of *race alone* to members of certain so-called 'minorities'." Petitioners' Opening Brief, p. 2. This characterization totally distorts the facts of the case. This is a case in which a racial classification is used not to grant a preference but, on the contrary, to alleviate severe discrimination burdening minority groups. The only person asking for a racial preference in this case is the petitioner, who asks this Court to grant a racial preference to whites by preventing the Law School from taking action which is absolutely necessary to neutralize the severely discriminatory effects of its own entry criteria.

The most fundamental fact in this case is that if the Law School had not adopted a minority admis-

sions program, its entry system would have been so grossly discriminatory as to result in the creation of an essentially segregated student body. Without the minority admissions program, only one, or at most two, of all black, Chicano, Filipino and Native American applicants would have been admitted. Furthermore, the discriminatory entry criteria do not measure the ability to perform in the legal profession, or for that matter, the ability to perform in law school. Thus, Petitioner requests that he be granted an admissions preference on the basis of severely discriminatory entry criteria which are invalid and unjustified by any state interest.

This brief admittedly attacks several revered traditions in the admission procedures of most educational institutions. It does so for a reason. This brief will show that the University of Washington Law School has in the past used entry criteria which have little or no demonstrable relationship to law school performance, and even less to subsequent performance as a lawyer. Given this background, Amici argue that the Law School not only has the freedom to try different selection criteria which will increase minority participation, while not hurting the quality of legal education and legal practice, but in fact may be constitutionally required to use different criteria.

This brief presents four reasons why the decision of the Supreme Court of the State of Washington should be affirmed. First, as stated above, the relief requested by petitioner would be illegal if granted since it involves a return to a discriminatory system

which does not satisfy the requirements of the equal protection clause, the rule of *Griggs v. Duke Power,* and Title VI of the Civil Rights Act of 1964. Second, public agencies such as the Law School have discretion to adopt programs, such as the minority admissions program, designed to rectify the discriminatory effects of their own screening mechanisms. Third, the Law School's minority admissions program does not involve the type of racial classification to which the presumption of unconstitutionality applies; since the program is rationally related to legitimate state interests, it is constitutionally permissible. Fourth, even if the racial classification were characterized as suspect, the minority admissions program serves a compelling state interest and is, therefore, constitutionally valid. Each of these four reasons is sufficient for affirmance.

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## ARGUMENT

### I. FACTUAL ANALYSIS: THE TRADITIONAL SCREENING DEVICES USED BY THE LAW SCHOOL HAD A SEVERELY ADVERSE IMPACT ON NONWHITE APPLICANTS AND WERE NOT JUSTIFIED BY ANY SUBSTANTIAL STATE INTEREST.

#### A. The Law School's use of the college degree, the college grade point average and the Law School Admission Test score as entry criteria almost entirely excluded minority applicants.

The record before this Court establishes that the Law School, in screening applications for the class which was to enter in 1971, used at least three separate criteria which were severely discriminatory in

effect against nonwhite persons.[1] First, the Law School had an absolute requirement that applicants be college graduates. Applications from nongraduates were not even considered. Second, the Law School used the applicants' college grade point averages (GPA's) as a screening factor. Third, the Law School used the applicants' scores on the Law School Admission Test (LSAT) as a screening factor. Furthermore, the GPA and LSAT were not simply two screening devices among many; they were the fundamental criteria which determined in most instances which persons were to be admitted or excluded. The record makes it quite clear that if nonwhite race had not been used as a neutralizing entry criterion, *all but one* of the nonwhite applicants (excluding Asian) would probably have been denied admission, nearly all of these on the basis of LSAT score and GPA alone. The severely discriminatory effect of each of the three entry criteria is explained fully in the following sections.

---

[1]Respondents, in presenting their case below, did not concentrate on making a clear record regarding the racially discriminatory effects of their own entry criteria. This is quite understandable since it is not easy either to recognize or to display publicly the facts regarding racial discrimination within one's own organization. It is therefore not surprising that respondents chose to present the case in terms of the permissibility of their minority admissions program rather than in terms of the illegality of their traditional entry system. Despite the fact that no direct effort was made to prove the discriminatory effect of the entry criteria, however, the record does contain sufficient information to compel the conclusion that the entry system would have discriminated against nonwhites if race had not been used as a neutralizing entry criterion.

1. **The college degree.**

Information gathered during the 1970 Census demonstrates that the percentage of white persons who obtain college degrees is much higher than it is for persons of nonwhite races.[2] In 1970, only 6.1% of all black persons between the ages of 25 and 34 had completed four or more years of college while 16.6% of white persons between the ages of 25 and 34 had completed four or more years of college. Census Report at 81, Table 67. Thus, the percentage of white persons who have completed four or more years of college is nearly three times as high as the percentage of black persons.

TABLE A

PERCENT OF POPULATION 25 TO 34 YEARS OLD WHO COMPLETED FOUR YEARS OF COLLEGE OR MORE.

| | *Black* | *White* |
|---|---|---|
| 1960 | 4.3% | 11.7% |
| 1966 | 5.7% | 14.6% |
| 1970 | 6.1% | 16.6% |

Additional tables which appear at pages 82 and 84 of the Census Report show that the racial disparity also exists in present college enrollment and that other minority races are similarly underrepresented.[3]

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[2]Census information is, of course, subject to judicial notice by this Court. Statistics comparing college attendance of black and white persons have been set forth in *The Social and Economic Status of Negroes in the United States*, 1970 BLS Report No. 394, published in 1971 by the Bureau of the Census [hereafter referred to as the Census Report].

[3]The use of the college degree as a strict prerequisite for entry may account in large part for the fact that only 4.4% or 70 out of 1601 applicants for entry into the Law School in 1971 were non-

**2. The college grade point average (GPA).**

A recent study by Leonard L. Baird of the Educational Testing Service (hereinafter ETS) has established, on the basis of solid and extensive data, what has been known from narrower studies for a long time, namely, that the average college GPA of white students is substantially higher than of nonwhites. Baird, *Blacks in Graduate and Professional School, Findings,* vol. 1, no. 2 (Princeton, N. J.: Educational Testing Service, 1974).[4] The study was based upon a survey of 21,000 students who were seniors in 1971 at 94 colleges across the nation.

For purposes of this brief, the key finding in Baird's study is set forth at page 5.

> About a third (34 percent) [of the black students] had undergraduate grades of C or C+, compared to 16 percent of the whites; 44 percent had B grades compared to 32 percent of the whites; and only 21 percent had B+, A or A+ grades compared to 50 percent of the whites.

In tabular form, these findings are as follows:

| | Race | |
|---|---|---|
| *GPA* | *Black* | *White* |
| B+ and above | 21% | 50% |
| B | 44% | 32% |
| C or C+ | 34% | 16% |

white. Clearly some discriminatory mechanism was operating even prior to the receipt of applications, and it seems safe to conclude that the college degree requirement played a substantial role in reducing the percentage of minority applications to such a disproportionate level.

[4] This study is about to be published.

As these findings show, the percentage of white college students having GPA's of B+ or above is nearly two and one-half times as high as that of blacks, and the percentage of white students having GPA's in the C range is less than half that of blacks. The severely discriminatory effect of the use of the college GPA as an entry criterion for graduate school is particularly striking in view of the fact that most graduate schools tend to expect at least a B+ college GPA on the part of those students to whom they offer admission.[5]

From the data available in the record in the present case, it appears that the use of college GPA's for screening Law School applicants in 1971 would have had a substantial discriminatory effect if it had not been neutralized by the minority admissions program. Of the 328 applicants whose GPA's are reported in the Single Appendix, only 4.2% of the whites had GPA's below 3.0, while 43.2% of the nonwhites had GPA's below 3.0 (A-37-46).[6]

---

[5]Baird's study confirms findings of previous studies which were based on narrower data. *See, e.g.*, Cleary, *Test Bias: Validity of the Scholastic Aptitude Test for Negro and White Students in Integrated Colleges* (Princeton, N.J.: Educational Testing Service, 1966), at 16-19.

[6]This analysis is based solely upon data in the record relating to persons invited to attend or on the waiting list as of August 1, 1971. If Asians were excluded from the figures for nonwhites, the discriminatory effect would be substantially greater than that shown in the table. On the other hand, if GPA's of the other white applicants were taken into account, the difference might be lowered. The difference would not, however, be neutralized, since the severe disparity between PFYA's of whites and nonwhites reflects substantial disproportion in both GPA's and LSAT scores. *See* section I(A)(4).

| | Race | |
|---|---|---|
| *GPA* | *Nonwhite* | *White* |
| Below 3.0 | 43.2% (19) | 4.2% (12) |
| 3.0 to 4.0 | 56.8% (25) | 95.8% (272) |

**3. The Law School Admission Test (LSAT).**

A recent study demonstrates that blacks score on the average substantially lower than whites on the LSAT.[7] Evans & Reilly, *A Study of Speededness as a Source of Test Bias,* Journal of Education Measurement, vol. 9, no. 2 at 123-31 (1972). The study was based upon a comparison between the LSAT performance of 465 black students enrolled in predominantly black southern colleges and a random sample of 2495 students tested at regular testing centers in 1970. The purpose of the study was to determine whether the time limits involved in the LSAT have a discriminatory effect on blacks. In order to reach any conclusions on this issue, the study team had to generate data on the mean LSAT scores of the special black sample and the regular sample. These data are set forth in the following table:

[7]This Court has had first-hand experience with discriminatory written aptitude tests in the *Griggs* case, in which the Wunderlic Personnel Test was held to be discriminatory and its use enjoined. *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971).

| Mean LSAT Score | |
|---|---|
| Black sample (speeded) | 56.12 (n=230) |
| Black sample (unspeeded) | 56.49 (n=235) |
| Regular sample (speeded) | 86.27 (n=1251) |
| Regular sample (unspeeded) | 85.99 (n=1245) |

As the table shows, the black students had an average score of roughly 56 while the regular students had an average score of roughly 86. The discriminatory effect was, in short, drastic.[8]

The record in this case strongly suggests that the unneutralized use of LSAT scores would have had a severely discriminatory impact on the applicants for Law School entry in 1971. The following table is based upon data contained in the Single Appendix at 37-46 for the 330 applicants who were either invited to attend the Law School or placed in the top two quartiles of the waiting list.

---

[8]It should be pointed out that the black sample used in this study was not random. The sample was obtained solely during a "fee free" administration of the test at predominantly black southern colleges. Thus, there are at least three factors that might introduce bias into the study: (1) the omission of nonsouthern schools, (2) the omission of integrated schools and (3) the fact that no fee was charged. It is clear, however, that these factors cannot account for the drastic difference in scores.

This is confirmed by two recent but not yet published studies by the Educational Testing Service, which demonstrate substantially disparate mean LSAT scores of whites and nonwhites. While we have been informed of these studies by ETS personnel, ETS has so far refused to make these studies public.

| | *Race* | |
|---|---|---|
| | *Nonwhite* | *White* |
| 600 and above | 27.3% | 87.7% |
| *LSAT Score* | | |
| below 600 | 72.7% | 12.3% |
| 500 and above | 59.1% | 100.0% |
| *LSAT Score* | | |
| below 500 | 40.9% | 0.0% |
| 60 and above | 29.5% | 76.5% |
| *Reading Score* | | |
| below 60 | 70.5% | 23.5% |

Thus, the conclusion is unavoidable that the Law School's use of the LSAT as an entry criterion would have had a severe racially discriminatory effect if it had not been neutralized by the minority admission program.

**4. The Predicted First Year Average (PFYA).**

The extremely discriminatory effect of the Law School's screening system is further evident from the facts present in the record regarding the use of the Predicted First Year Average (PFYA) as a major screening factor. The PFYA is a composite measure based upon college GPA (junior-senior years) and LSAT scores. Since, as shown above, both of these criteria are discriminatory, it is no surprise that the PFYA is also discriminatory. The following table shows that, if the PFYA's of *all 1601* Law School applicants are taken into account, the percentage of

whites who had PFYA's above 75 was more than two and one-half times that of nonwhites.

| | Race | |
|---|---|---|
| *PFYA* | *Nonwhite* | *White* |
| Above 75 | 12.9% (9) | 34.0% (531) |
| Below 75 | 87.1% (61) | 66.0% (1000) |

Petitioner, Marco DeFunis, had a PFYA of 76.23. At that score, the disparity between whites and nonwhites is even more extreme. The rate at which nonwhite applicants achieved PFYA's above that figure was nearly six times the rate of the nonwhite applicants. Most striking is the fact that only one non-Asian minority in comparison to 282 whites achieved a score above 76.23.

| | Race | |
|---|---|---|
| *PFYA* | *Nonwhite (Excluding Asians)* | *White* |
| Above 76.23 | 3.2% (1) | 18.4% (282) |
| Below 76.23 | 96.8% (30) | 81.6% (1249)* |

*The tables in this section are based upon figures set forth in the Single Appendix. 540 of the 1601 applicants had PFYA's above 75 (A-34). 9 of the 44 nonwhite applicants invited to attend had PFYA's above 75 (A-37-46). Since nonwhites with much lower PFYA's than 75 were admitted, it is assumed that all of the 26 nonwhites who were denied had PFYA's lower than 75. Since only 9 of the 540 applicants whose PFYA's exceeded 75 were nonwhite, the other 531 were white.

288 applicants had PFYA's above 76.3 (A-34) and therefore above Marco DeFunis whose PFYA was 76.23 (A-34). Only 6 nonwhites had PFYA's above DeFunis (A-37-46, 52). Therefore, at least 282 of the 1531 white applicants had PFYA's above DeFunis. Only 1 out of 31 nonwhites (excluding Asians) had PFYA's above De Funis (A-56). Note, also, that if the 26 nonwhites who were denied admission were included in this table, the

When these figures are analyzed further, it appears that if the Law School had not sought to neutralize the discriminatory effect of the PFYA, the admissions system would have resulted in an essentially segregated Law School. In all probability, of the combined applicants from the black, Chicano and Native American races, at most two would have been admitted if the Law School had not developed a minority admissions program. Out of 1315 white applicants with PFYA's below 76.20, only 33 (2%) were invited to attend. Since all but one of the non-Asian minority applicants had PFYA's below 76.20, we must assume that if race had not been used as a factor, only 2% would have been invited to attend. Thus, at most, one black, Chicano or Native American might have been invited in addition to the one who had a PFYA above 76.20.

In sum, the unneutralized use of the Law School's entry system (including the use of the college degree, the GPA, the LSAT score and the PFYA) would have had an almost totally exclusionary effect on non-Asian minority applicants and would have perpetuated the past racially segregated character of the Law School.[10]

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nonwhite percentage would be even lower. Thus, the 3.2% figure is substantially higher than the complete figure.

It should be noted that these tables include data on all 1531 white applicants, so the differences are real and not subject to any arguable reduction.

[10]There are cases which suggest that a fourth factor, the requirement of recommendation letters, may also have been discriminatory. See, e.g., *Hawkins v. North Carolina Dental Society*, 355 F.2d 718 (4th Cir. 1966); *Meridith v. Fair*, 298 F.2d 696 (5th Cir. 1962).

**B. The entry criteria which adversely affect minority applicants are not justified by any substantial state interest.**

**1. The college degree.**

Policies governing requirements for bar membership in various states demonstrate that there is no substantial reason for using college graduation as a prerequisite for entry into law school. *See, e.g., Black's Law Dictionary* (Rev'd 4th ed. 1968), pp. LXXV-LXXX. As late as 1968, only seven states required a college degree or its equivalent as a prerequisite to beginning law study. *Ibid.* The American Bar Association's recommendation was only three years' college study before the start of law school. *Ibid.* Furthermore, the entire history of the Americal legal profession flies in the face of any contention that a college degree requirement for lawyers is necessary to the operation of the legal profession. This Court can take notice of the fact that college graduation was historically not a requirement for entry into law. On the contrary, the legal profession, like the other skilled trades, used apprenticeship as its training method. Persons seeking to become lawyers obtained positions in the offices of practicing lawyers and learned law through on the job training.

In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), this Court emphasized the danger of using diplomas and degrees as fixed barriers to economic opportunities.

> The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas and degrees as fixed measures of capability. History is filled

> with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas or degrees. 401 U.S. at 433.

Nowhere is this statement more applicable than in the legal profession. In this regard it is worth noting that Abraham Lincoln, who had only one year of formal education, would have been summarily denied admission under the criteria used by the Law School.

**2. The college grade point average (GPA).**

Available evidence from the social sciences demonstrates that college grade point average does not have a substantial correlation with success in law or indeed in any other vocation. One study summarizes the available research on the issue through 1965. Hoyt, *The Relationship between College Grades and Adult Achievement. A Review of the Literature* (Iowa City, Iowa: American College Testing Program, 1965). In his report, Hoyt examined the relationship between college grades and adult achievement in business, teaching, engineering, medicine, scientific research, miscellaneous additional occupations (including law) and non-vocational activities. The overall conclusion of the study is that college grades have no demonstrable relationship to any measures of adult accomplishment.

> Although this area of research is plagued by many theoretical, experimental, measurement, and statistical difficulties, *present evidence strongly suggests that college grades bear little or no rela-*

*tionship to any measures of adult accomplishment. Id.* at i. (Emphasis added.)

The conclusions reached in Hoyt's report for the specific areas examined are as follows:

*Business:* "The weight of evidence suggests no relationship between the two [college grades and future success in business]." *Id.* at 12.

*Teaching:* "Only isolated examples from past research indicate a correlation between grades and a measure of teaching success. In those instances where positive results were found, the relationships were generally of a very low magnitude." *Id.* at 20.

*Engineering:* "Until more intensive work is done to devise suitable criteria of engineering success, the relationship of college grades to engineering performance cannot be established definitely." *Id.* at 24.

*Medicine:* "At this time, medical school grades seem to bear a positive relationship to the early success of physicians. These grades are apparently not predictive of physician performance after the first few years of practice. The evidence suggests that undergraduate grades are unrelated to success in medical practice." *Id.* at 30.

*Scientific research:* "While all findings are not perfectly consistent, college grades seem to have no more than very modest relationship to measures of research performance." *Id.* at 36.

These findings are quite striking for several reasons. First, the conclusion that is consistently reached is that college grades have either no correlation or at

best a very modest correlation with adult achievement. Second, the studies focused on professional activities such as medicine and engineering, which are sufficiently similar to law to raise similar doubts about the relationship between college grades and success in legal work. Third, the report even rebuts the relationship between college grades and success in such purely "academic" fields as scientific research, where one would expect some substantial relationship to exist if anywhere. Thus, on the basis of the available research, it seems safe to conclude that college grades are certainly not significantly related to success in the down to earth, rough and tumble of law practice and probably not related even to success in the more academic side of law, including research, teaching and appellate work.[11]

Perhaps the most sophisticated study on this subject was that reported by Price, Taylor, Richards and Jacobsen in *Performance Measures of Physicians* (University of Utah, 1963). In carrying out the study, the team analyzed approximately 200 performance measures (including ratings by other physicians, self-ratings, number of requests for consultation, contributions to the field, quality of hospitals in which work

[11]The available research dealing with the legal profession itself was unfortunately too meager to allow any firm conclusion. These studies are reported at page 37 of Hoyt's report. Two rather early and unsophisticated studies (Kunkel 1917; Gambrill 1922) suggested "a modest relationship between academic and occupational success." A later study (Jepsen 1951) involving doctors, lawyers, and engineers shows "a significant negative correlation (—.15) . . . between college GPA and salary."

was performed, etc.) and then settled on 80 measures which were used for computer analysis. The sample studied included 102 medical school faculty members, 190 certified medical specialists and 217 general practitioners. The results of the study are set forth in the following important statement:

> *A second, very consistent finding of this research was that academic achievement does not bear a positive relationship to performance as a practicing researcher, academician, or physician.* On the contrary, in each of our five studies both premedical and medical school achievement was found to be essentially independent of the numerous measures of professional contributions, accomplishments, and activities that we analyzed. . . . [*A*]*cross all groups studied . . . academic grades showed a zero (chance) relationship to our measures of physician performance. In view of this, medical school selection programs, which tend to select students that have attributes necessary for successful accomplishment in medical school and assume that these same attributes are also necessary for performance in medical practice, should be searchingly examined. Id.* at 111. (Emphasis added.)

The Price, Taylor report is important because it is an extremely sophisticated study of an important professional field which demonstrates a radical absence of relationship between college grades and professional performance.

The studies reported in this section raise another important point, namely the relationship between *law school grades* and success in the practice of law. The

studies indicated that there is no substantial correlation between graduate school grades and success in professional life. The Price, Taylor study, for example, found that *"both premedical and medical school achievement"* showed a "zero (chance) relationship" to physician performance. This finding was confirmed by Hoyt, who states that medical school grades are "not predictive of physician performance after the first few years of practice." Hoyt, *supra* at 30. Thus, even if college grades did accurately predict law school grades, this would not justify the use of college grades as a law school entry criterion, since law school grades are immaterial to success in the legal profession, the agreed goal of the law school program.

Finally, and this is the point which ultimately reduces petitioner's position to its true absurdity, college GPA's are not even good predictors of law school grades. In fact, college GPA's are not even good predictors of *first year* law grades.

> Yet even if the probability of earning good grades is accepted as the most justifiable basis for selecting graduate students, problems still remain in the use of undergraduate grades for selection. *They just don't predict graduate school grades very well.*
>
> Studies relating undergraduate grades to first-year grades in graduate and professional schools over the past 20 years and in all kinds of programs have shown correlation coefficients that fluctuated around the value 0.30. Warren, *Current Grading Practices* (Washington, D.C.: American Association for Higher Education, 1971) at 5.

In short, college GPA's are relatively poor predictors even of first year graduate school grades. What about college GPA's as predictors of second and third year grades? Here the performance is even poorer, particularly in clinical courses.[12]

> Predictions of grades beyond the first year of graduate school have been still lower, and predictions of grades in clinically oriented programs have been little better than chance. *Id.* at 6.

Once these facts are understood, the irony of petitioner's position becomes manifest. Petitioner asks this Court to order the Law School to admit him in preference to nonwhite applicants on the basis of a criterion which purports to predict first year law school grades, but which does so poorly, which predicts second and third year grades even more poorly, which does not predict grades in clinical courses and which does not predict the achievement of the law school student after graduation. To grant petitioner's request would be to raise first year law school grades to a position of independent significance which they cannot begin to merit and then use them as a basis for denying to the nonwhite races entry into the legal profession, thereby ignoring one of the most important rights in the American system, namely, the right to equality of opportunity without regard to race. As Hoyt stated in the conclusion of his study.

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[12]Clinical courses are often more representative of actual work in the legal profession generally than are the purely academic courses.

The practice of basing admission to schools of education, business, engineering, or medicine[13] largely or exclusively on undergraduate grades seems indefensible. Hoyt, *supra* at 49-50.

**3. The Law School Admission Test Score (LSAT).**

The record is totally devoid of any evidence that the LSAT is job related, i.e., that it is a valid predictor of performance within the legal profession. One reason for this is that no validation studies have been undertaken. This fact has been confirmed by the Educational Testing Service, the organization which is responsible for administering the LSAT. Furthermore, it is very unlikely that the LSAT (an aptitude-type test) would correlate with success in a general field as broad and diversified as the legal profession. The federal courts have consistently frowned upon the use of a single general symbolic-analytic aptitude test as a screening device for entry into a general field containing a wide variety of different jobs for the obvious reason that written tests simply cannot accurately measure the qualification of individuals for widely divergent human activities. *See, e.g., Griggs v. Duke Power Co.,* 401 U.S. 424 (1971) (Wunderlic Personnel Test); *Armstead v. Starkville Municipal Separate School District,* 461 F.2d 276 (5th Cir. 1972) (Graduate Record Examination); *Chance v. Board of Examiners,* 458 F.2d 1167 (2d Cir. 1972) (National Teachers Test).

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[13] And, we would respectfully submit, law.

Furthermore, the available evidence suggests that the LSAT is not even a valid predictor of law school grades. *See, e.g.*, Goolsby, *A Study of the Criteria for Legal Education and Admission to the Bar*, 20 Journal of Legal Education 175 (1967):

> Research reports to date present overwhelming evidence that tests used in the selection process do not predict the criterion of grades at any practical level, including a report concerning LSAT (Barbara Pitcher, 1965) published by Educational Testing Service.

The Court should note that the LSAT is designed solely to predict first year law school grades. If second and third year grades are taken into account, the correlation is even below that reported by Goolsby. Finally, the LSAT is not designed in any way to predict performance in clinical courses, which may be more directly related to actual performance within the legal profession than grades in academic courses.

**C. The Law School's minority admissions program was a reasonable attempt to rectify the exclusionary effects of its entry criteria.**

We have demonstrated that if the Law School's minority admissions program had not existed its entry criteria would have excluded all but one, or at most two, black, Chicano, and Native American applicants. Furthermore, we have demonstrated that the exclusionary criteria are invalid since they do not measure the ability of the applicant to practice law, or for

that matter, the ability of the applicant to perform in law school. In any case, it is clear that the record does not demonstrate that the entry criteria are valid.

The Law School's minority admissions program was a reasonable attempt to neutralize the exclusionary effect of the invalid entry criteria. Unlike a quota, the minority admissions program did not establish an inflexible percentage or number of minority applicants to be admitted regardless of their qualifications. The minority admissions program was a perfectly proper attempt by the Law School to provide an alternative method for locating qualified minority applicants without being solely restricted to the discriminatory and invalid entry criteria that had unjustifiably excluded them in the past.

The evidentiary record indicates that approximately twelve percent (eighteen out of one hundred and fifty) of the enrollees at the Law School in 1971 were minority. This percentage is substantially less than the percentage of minorities in the United States, i.e., approximately 16.3% not including Asians. This fact is particularly important in light of the explicit policy of the Law School to become a national law school and to seek students throughout the United States. Furthermore, the percentage of minorities admitted to the Law School reasonably reflects the minority percentage in the immediate Seattle area (11.0% not including Asians) and in the Western United States (15% for the states of Washington, Oregon, California, Montana, and Idaho). These percentages clearly indicate that the Law School's minor-

ity admissions program only neutralized the discriminatory effects of its entry system.[14]

It is important to note that the minority admissions program does not result in the admission of unqualified persons. On the contrary, it is based upon an accurate perception by the Law School that the mechanical entry criteria are not adequate measures of qualifications for minority persons. Indeed, as discussed above, the entry criteria do not even validly measure the qualifications of white applicants. This points out a fundamental fallacy that reappears consistently in the briefs submitted by petitioners and amici. They argue that Marco DeFunis is more qualified than the minorities who were invited to attend the Law School. Yet, the contention that petitioner is more qualified is primarily based upon the fact that he had a somewhat higher performance on the PFYA. Since the PFYA is an invalid measure of qualifications, the small difference in the PFYA scores simply does not prove that he is more qualified.

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## II. LEGAL ANALYSIS: THERE ARE FOUR INDEPENDENT REASONS WHY THE DECISION OF THE WASHINGTON SUPREME COURT MUST BE AFFIRMED.

Petitioner's request for relief must be denied for four separate reasons. First, the relief requested by petitioner would contravene the equal protection

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[14]We believe that even if the Law School had enrolled a higher percentage of minorities than presently reside in the western states, this would have been a proper means of eradicating the effects of its own past discrimination. In any case, it is not essential to reach this issue here.

clause and the Civil Rights Act of 1964 since, by requiring a return to the former system of admissions, it would give preference to white applicants, and almost totally exclude nonwhite applicants, solely on the basis of entry criteria which are racially discriminatory in effect and which are not justified by any substantial state interest. Second, public agencies such as the Law School have discretion to adopt programs designed to neutralize the effects of agency policies which have an adverse impact on racial minorities. Third, the racial classification used by the Law School should not evoke the presumption of unconstitutionality normally applied to racial classifications burdening racial *minorities;* since the Law School has shown that the minority admissions program is reasonably related to a legitimate state purpose it should be upheld. Fourth, even if the most rigorous standard of equal protection review were used to test this program, it would be satisfied because the program is justified by several overriding state interests.

**A. Petitioner asks this Court to issue an unconstitutional order since the relief requested would require the law school to return to a system of admissions that gives priority to white applicants on the basis of discriminatory entry criteria which are not justified by any substantial state interest.**

The preceding section of this brief established, first, that inflexible application of the Law School's mechanical entry criteria would almost totally exclude minorities from a legal education, and from the legal profession, and second, that these mechanical criteria are not validly related either to performance within

law school or the legal profession. Given these facts, it is evident that petitioner has mischaracterized the case when he refers to it as a "minority preference case." To the contrary, it is precisely petitioner who seeks to obtain an illegal preference when he asks this Court to order the Law School to give him priority over nonwhite applicants solely on the basis of invalid and racially exclusionary entry criteria. The relief that petitioner requests must be denied since it would contravene (1) the equal protection clause as traditionally understood, (2) the equal protection clause as interpreted in light of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and (3) Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which this Court recently relied upon in striking down educational policies which had a discriminatory effect on minority groups. *Lau v. Nichols*, 42 USLW 4165 (Jan. 21, 1974).

**1. The equal protection clause prohibits a public law school from using entry criteria which disproportionately disqualify nonwhites in the absence of a substantial or compelling justification.**

Stated most charitably, this case involves the use of facially neutral entry criteria which almost totally exclude racial minorities. Numerous decisions of this Court and lower courts hold that such exclusion violates the equal protection clause unless it is specifically shown to be justified by some substantial state interest. *See, e.g., Turner v. Fouche*, 396 U.S. 346 (1970); *Carter v. Jury Commission*, 396 U.S. 320 (1970); *Louisiana v. United States*, 380 U.S. 145 (1965); *Griffin v. School Board*, 377 U.S. 218 (1964);

*Hill v. Texas*, 316 U.S. 400 (1942); *Armstead v. Starkville Municipal Separate School Dist.*, 461 F.2d 276 (5th Cir. 1972); *Carmichael v. Craven*, 457 F.2d 582 (9th Cir. 1971), *cert. denied*, 409 U.S. 929 (1972); *Labat v. Bennett*, 365 F.2d 698 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967).[15]

Whenever a state classification has a substantially adverse impact on minority races, at a minimum, the state has the obligation to justify its action.

> [T]he Board's examinations have a significant and substantial impact on black and Puerto Rican applicants. That harsh racial impact, even if unintended, amounts to an invidious *de facto* classification that cannot be ignored or answered with a shrug. At the very least, the Constitution requires that state action spawning such a classification "be justified by legitimate state considerations." (citations omitted.) *Chance v. Board of Examiners*, 458 F.2d 1157, 1175-76 (2d Cir. 1972).

*See, e.g., Otero v. New York Housing Authority*, 484 F.2d 1122 (2d Cir. 1973); *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968); *Larry P. v. Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972); *Hobson v. Hanson*, 269 F. Supp. 401 (D.D.C. 1967), *cert. dismissed*, 393 U.S. 801 (1969).

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[15]This Court has explicitly stated that a finding of illegal racial discrimination does not need to be based upon a prior finding of intent or purpose to discriminate. *See, e.g., Palmer v. Thompson*, 403 U.S. 217, 225 (1971); *Griffin v. School Board, supra; NAACP v. Button*, 371 U.S. 415 (1963).

There has been no adequate showing of a legitimate state interest justifying the entry criteria used in this case.[16] On the contrary, as demonstrated in section I. B *supra* of this brief, the college degree, the college GPA, and LSAT scores do not validly predict success in the legal profession or even, to any substantial degree, success in law school. These criteria are only useful in that they have a mild correlation to first year law school grades. Their use for this extremely limited purpose cannot possibly justify the exclusion of black, Chicanos and Native Americans from legal education and entry into the legal profession.

Furthermore, there are at least three reasons why this Court should subject the Law School's use of discriminatory entry criteria to particularly close scrutiny and deny the relief requested in the absence of a showing of an overriding need to continue their use. First, respondents were aware of the impact of their admissions criteria. At least some of the respondents

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[16]We believe that in this case the petitioner should have the burden of proving the substantial state interest supporting the use of the discriminatory entry criteria. In the normal case of alleged racial discrimination, the plaintiff seeks to enjoin the use of discriminatory criteria, and the burden is upon the state to justify its continued use of that criteria. However, in this case, petitioner seeks to compel the Law School to use discriminatory criteria for purposes of admitting him instead of nonwhite applicants. Since the Law School opposes the exclusive use of those criteria, it would make no sense to require the Law School to prove that the criteria are supported by a substantial state interest.

Moreover, in this case, petitioner asserts that he is more qualified than nonwhite applicants that have been admitted to the Law School. Since petitioner is seeking to prove that he is more qualified primarily on the basis of the entry criteria, he should have the burden of proving that such criteria are valid measures of qualification.

had first hand knowledge of the relative GPA's, LSAT scores and PFYA's of the white and nonwhite law school applicants. As professional academicians and specialists in the screening of applicants, respondents certainly know that college grade point averages and scores on difficult symbolic-analytic written tests are criteria which have a severely adverse effect on nonwhite applicants.[17] Respondents must be presumed to have intended the obvious known results of their behavior. Moreover, respondents could have discontinued the use of these discriminatory criteria if they wished. Thus, this is not a case involving wholly innocent use of classifications having a discriminatory effect. The fact that respondents adopted an affirmative action program to neutralize the discriminatory effects of their entry system clearly shows that they were indeed aware that discrimination was present in the system[18] Had respondents failed to do so, minor-

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[17]The discriminatory effect of written tests of nearly all kinds has been common knowledge within the academic community for many years.

[18]Once respondents became aware that their entry system was grossly discriminatory, they had only two options. First, they could have discontinued the use of the discriminatory criteria. Second, they could have adopted a minority admission program designed to neutralize the discriminatory effects of the criteria (as they, in fact, did in this case). If this Court now prohibits respondents from following the second course of action, the result will be that respondents—and other law schools throughout the nation—will be forced to discontinue the use of educational requirements, the GPA and the LSAT as screening mechanisms. Otherwise, the law schools would be subject to suit for using exclusionary and invalid criteria. This would mean that law schools would have to resort to wholly subjective entry criteria. Until rational alternatives are available, the sensible and legally permissible approach is to allow the law schools to continue using the suspect criteria and to implement minority admission programs to neutralize their discriminatory effect.

ity applicants could plausibly have challenged their admissions program as purposefully discriminatory.

Second, this Court has repeatedly recognized that when a classification results in a virtually complete exclusion of minorities, close scrutiny is appropriate and the state must come forward with some substantial justification. *Hernandez v. Texas,* 347 U.S. 475 (1954). In this case, virtually all blacks, Chicanos and Native Americans would have been excluded and an essentially segregated Law School would have resulted if the discriminatory effect of the PFYA had not been neutralized by the minority admissions program.

Third, the right to nondiscriminatory entry into the legal profession is a preferred right which this Court is obliged to protect with extreme care. *Cf. Turner v. Fouche,* 396 U.S. 346 (1970); *Fortson v. Dorsey,* 379 U.S. 433, 439 (1965); *Gomillion v. Lightfoot,* 364 U.S. 339 (1960); *NAACP v. Button,* 371 U.S. 415 (1963). The fundamental concept which underlies the doctrine of preferred position is that the courts have a special obligation to prevent restrictions which interfere with the free operation of the political process since, in a democracy, it is the political process to which the people must look for an adjustment of their grievances. The preferred position doctrine applies, if anywhere, precisely in cases involving restrictions on the access of minority racial groups to the political process. *United States v. Carolene Products,* 304 U.S. 144, 152 n.4 (1938).

The relief requested by petitioner would drastically restrict the access of minority groups to the legal profession, which has historically maintained a dominant position within the political process. Ever since the Constitutional Convention, lawyers have dominated the national legislature. For example, at the present time, nearly seventy percent of the members of the United States Senate and over fifty percent of the members of the House of Representatives are lawyers. "By virtue of their professional aptitudes and natural interests, lawyers have been leaders in government throughout the history of our country." *In re Griffiths,* 413 U.S. 717, 721 (1973).

Furthermore, the rights minority races achieve through the political process will only be enforced if there are attorneys willing to do so. This Court has ruled that litigation brought to protect the civil rights of minority groups is a mode of political expression which deserves special protection because groups that are unable to achieve their objectives through the ballot frequently must turn to the courts. *NAACP v. Button,* 371 U.S. 415, 429-30 (1973). Since litigation may be the most practicable avenue open to a minority person to petition for redress of grievances, the interest racial minorities have in equal opportunity to enter law schools, and thus the legal profession, should also deserve special judicial attention. *Cf. United Transportation Union v. State Bar,* 401 U.S. 576, 585-86 (1971); *United Mine Workers v. Illinois Bar Association,* 389 U.S. 217 (1967).

Spread throughout the record in this case and throughout the legal literature is overwhelming evidence that nonwhite races (particularly blacks) have been excluded from the legal profession in drastic disproportion to their numbers in the population. Thus, although roughly eleven percent of the nation's citizens are black, approximately one percent of the nation's lawyers are black. [See discussion in §II.(D), *infra.*] The exclusion of nonwhites from the legal profession has contributed to the alienation of minority groups from the political process. So serious has the adverse effect been that the nation was forced to suffer through a series of divisive race riots in the 1960's before the scope of the problem could even be perceived by the dominant political forces.

Petitioner asks this Court to rule that law schools cannot undertake programs designed to rectify the discriminatory effects of the entry criteria that they have used and continue to use. If this request were granted, it would sharply curtail the access of the nonwhite races to the legal profession. For this reason, such a request must be subjected to especially close scrutiny in order to ensure that the preferred right of nonwhite races to nondiscriminatory entry into the legal profession is not violated.

**2. The equal protection clause, interpreted in light of Griggs v. Duke Power Co., prohibits the creation of racially discriminatory barriers to employment such as those involved in this case in the absence of a showing that such barriers are job-related and justified by business necessity.**

**(a)** ***The rule of Griggs v. Duke Power Co.: racially discriminatory barriers to employment are illegal unless they are proved to be job-related.***

In 1971, this Court handed down one of the most important decisions in the history of equal employment opportunity law, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). This case established the fundamental rule that "barriers to employment" which are racially discriminatory in their effect are prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, unless they are "shown to bear a demonstrable relationship to successful performance of the jobs for which . . . [they were] used." *Id.* at 431. As the Court stated, *"If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." Id.*

Chief Justice Burger's opinion indicates that the Court's holding was based on two basic perceptions regarding the use of employment criteria. First, even where they are "fair in form," such criteria are frequently "discriminatory in operation" and act as "built-in head-winds" which prevent minority persons from obtaining equal employment opportunity. Second, many criteria which employers use to screen applicants for employment are not job related: they simply do not predict the applicant's ability to per-

form the job in question. In such cases, the use of the discriminatory criteria is not justified by any "business necessity."

Normally, in applying the rule of *Griggs v. Duke Power Co.*, the court must ask only two questions. First, are the employment criteria racially discriminatory in effect? Section I(A) *supra* of this brief shows that in this case, the answer to this question is yes. Second, are the employment criteria job-related and justified by business necessity? Section I(B) *supra* of this brief shows that in this case, the criteria are wholly invalid and unjustified. Here, however, there are two additional questions which must be asked. First, does the *Griggs* test, which was originally based upon Title VII of the Civil Rights Act of 1964, also apply by virtue of the equal protection clause to the creation of discriminatory employment barriers by state agencies? Second, is admission to law school a barrier to employment within the meaning of the *Griggs* test?

(b) *The equal protection clause prohibits state agencies from engaging in conduct which, if undertaken by private organizations, would constitute employment discrimination in violation of Griggs v. Duke Power Co.*

In its initial form, Title VII of the Civil Rights Act of 1964 did not apply to state and local governmental agencies. Therefore, not long after Title VII became effective, the question arose whether legal standards developed in Title VII cases against private employers also applied to employment discrimination cases against state agencies based upon the

equal protection clause and the Civil Rights Act of 1866, 42 U.S.C. 1981. The lower courts which have considered this issue have concluded that Title VII standards also apply to state agencies through the equal protection clause. Thus, for example, the Second Circuit, in affirming an injunction prohibiting the use of a written examination for determining promotions within the New York City School system, stated,

> [O]nce discrimination has been found it would be anomalous at best if a public employer could stand back and require racial minorities to prove that its employment tests were inadequate at a time when this nation is demanding that private employers in the same situation come forward and affirmatively demonstrate the validity of such tests. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e; *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 28 L.Ed. 2d 158 (1971). The anomoly would only be emphasized by the recent passage of the Equal Employment Opportunity Act of 1972, which broadened Title VII to include state and city public employers. *Chance v. Bd. of Examiners*, 458 F.2d 1167, 1176-77 (2d Cir. 1972).

For similar holdings, *see, e.g., Baker v. Columbus Municipal Separate School Dist.*, 462 F.2d 1112, 1114 (5th Cir. 1972); *Armstead v. Starkville Municipal Separate School Dist.*, 461 F.2d 276, 279 (5th Cir. 1972); *Castro v. Beecher*, 459 F.2d 725, 732-33 (1st Cir. 1972); *Carter v. Gallagher*, 452 F.2d 327 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972). These cases reflect the salutary principle that public agencies

should at least live up to the standards imposed on private employers.

The proposition that rules developed under Title VII apply in cases brought under the equal protection clause is fully supported by a functional analysis of the operative provisions of the two laws. Although Title VII is a lengthy statute, its operative provision reduces to a declaration that "it shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . employment. . . ." 42 U.S.C. § 2000e. Similarly, the equal protection clause prohibits the denial of "equal protection of the laws", a term which has been construed to mean "racial discrimination" generally. Thus, conduct which violates the general prohibition of Title VII would, if carried out by a state agency, violate the equal protection clause:

> Although differing from the present case in the respects that it was a decision under Title VII of the Civil Rights Act of 1964 and that it concerned intra-company assignment of employees by a private employer, *Griggs* construed broad statutory language proscribing classification of employees: "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race . . . or national origin." 42 U.S.C. § 2000e-2(a)(2). With substitution of "applicants" for "employees" the quoted statutory language not unfairly describes what we hold to be the constitutional constraints on a public employer. We cannot conceive that the words of the

> Fourteenth Amendment, as it has been applied in racial cases, demand anything less. *Castro v. Beecher,* 459 F.2d 725, 733 (1st Cir. 1972).

Thus, like Title VII, the equal protection clause requires the elimination of discriminatory devices that foster racial stratification to the disadvantage of minority citizens. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), *citing with approval, Castro v. Beecher, supra; Chance v. Board of Examiners, supra.*

(c) *Since the law school's racially discriminatory entry criteria function as barriers to employment in the legal profession, the Griggs rule should be used to test their legality.*

The central fact that must be remembered is that the Law School's discriminatory entry criteria would have prevented nonwhites from entering the legal profession. Thus, even though the law school is not technically an "employer" within the meaning of Title VII, the case does involve discriminatory "barriers to employment" within the meaning of *Griggs v. Duke Power Co.* In fact, given the "preferred position" of the right of insular racial minorities to nondiscriminatory access to the legal profession, we would submit that the *Griggs* test must be strictly applied to this case, and the racially discriminatory entry criteria rejected, unless they are a necessary rather than a mere rational method to select law school applicants.

To treat this case other than as an employment case would be to ignore the realities involved. The basic function of law school is to prepare persons for

entry into the legal profession. In this sense, law school is analogous to an apprentice program for entry into other trades. Numerous cases hold that racial discrimination in the selection of apprentices is illegal even though joint apprenticeship committees are not actually "employers". These cases reflect the sound and realistic principle that discriminatory apprentice selection is just as effective a barrier to employment opportunities as discrimination by specific employers. *See, e.g., United States v. Ironworkers Local 86,* 443 F.2d 544 (9th Cir.), *cert. denied,* 404 U.S. 984 (1971); *Dobbins v. Local 212, IBEW,* 292 F.Supp. 413 (S.D. Ohio 1968). *See generally* Yeager, *Litigation Under Title VII of The Civil Rights Act of 1964, The Construction Industry and The Problem of The "Unqualified" Minority Worker,* 59 Geo.L.J. 1265, 1272-75 (1971). In other cases, the courts have held that trade associations are employers for the purposes of Title VII because their influence over and responsibility for employment practices applying to the industry as a whole is greater than any single employer. *See, e.g., United States v. Local 638, Enterprise Ass'n.,* 360 F. Supp. 979, 995 (S.D.N.Y. 1973); *Williams v. New Orleans Steamship Ass'n.,* 341 F. Supp. 613 (E.D. La. 1972). The absolute control law schools maintain over entry into the legal profession makes the analogy to these cases compelling.

Since there is simply no reason to treat this case differently from standard employment cases, the *Griggs* rule should control here. Applying that rule,

it is clear that the Law School's discriminatory entry criteria cannot be justified even under the normal "job-relation" standard, let alone the stricter standard applicable here: There is no showing of job-relatedness in the trial record, and as the discussion in I(B) *supra* demonstrates, the entry criteria are clearly not job related. Therefore, petitioner is requesting this Court to enter an order requiring respondents to take action which would directly violate the equal protection clause as interpreted in light of the *Griggs* case. Such a request must be rejected.

**3. Title VI of the Civil Rights Act of 1964 prohibits the use of invalid law school admissions criteria which are discriminatory in effect.**

Petitioners have correctly recognized that "[t]he University of Washington is heavily funded by federal assistance of various kinds," and is therefore subject to the provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d. [Petitioner's Opening Brief, at 27.] The conclusion to be drawn from this is not, however, that Petitioner was subjected to racial discrimination prohibited by the statute. To the contrary, the statute required the Law School to take affirmative action to eliminate the discriminatory effects of its previous admissions policies.

Section 601 of the Act bans discrimination on the "ground of race, color, or national origin" in any program or activity receiving federal financial assistance." 42 U.S.C. §2000d. Pursuant to the authority granted in the statute, the Department of Health, Education and Welfare promulgated non-discrimination regulations, which are set forth in 45 CFR §§80

*et seq.* Acceptance of federal funds by the University of Washington bound the University to comply with the Act and HEW regulations. These regulations state that a recipient "may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination" or have "the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." 45 CFR 80.3(b)(2).[19]

As this Court recently acknowledged, the purpose of Title VI of the Civil Rights Act of 1964 was to insure that federal funds would be spent in such a manner as to aid in the elimination of the pervasive effects of racial discrimination. The Act prohibits not only deliberate discrimination, but also actions which have the *effect* of discriminating against persons of a particular race, color or national origin. *Lau v. Nichols,* 42 USLW 4165, 4167 (Jan. 21, 1974).

The use of admissions criteria which are discriminatory in effect is specifically prohibited with respect

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[19] 45 CFR 80.3(b)(2) provides:

(2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

to institutions of higher education. 45 CFR §§80.3 (b)(2), 80.4(d), 80.5(c).[20] The Law School used the PFYA as the primary criterion in the admission of students, and, as we have shown above, inflexible application of this standard would be severely discriminatory in effect. Since inflexible application of the Law School's ordinary admissions standards would have violated Title VI as interpreted by these regulations, the Law School was required to take affirmative action to neutralize the discriminatory effect of its admissions criteria. Recent federal amendments to the regulations confirm the Law School's obligation under Title VI to take neutralizing action. They state that when a program is administered in such a way as to discriminate against minorities, affirmative steps must be taken to overcome the effects of prior discrimination.

More specifically, § 80.3 of the new regulations provides at (b)(1)(6)(i) that

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[20] 45 CFR §80.4(d):

(d) Assurances from institutions. (1) In the case of any application for Federal financial assistance to an institution of higher education (including assistance for construction, for research, for a special training project, for a student loan program, or for any other purpose), the assurance required by this section shall extend to admission practices and to all other practices relating to the treatment of students.

45 CFR §80.5(c):

(c) In a research, training, demonstration, or other grant to a university for activities to be conducted in a graduate school, discrimination in the admission and treatment of students in the graduate school is prohibited, and the prohibition extends to the entire university unless it satisfies the responsible Department official that practices with respect to other parts or programs of the university will not interfere, directly or indirectly, with fulfillment of the assurance required with respect to the graduate school.

> In administering a program regarding which the recipient has *previously discriminated* against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.[21]
>
> 38 Fed. Reg. 17979 (July 5, 1973)

The explanatory statements accompanying the amendments indicate that this section was added to clarify a recipient's obligations under the Act. Section 80.3(b)(6) was added to *require* funded programs to take affirmative steps to overcome the effects of prior discrimination and to indicate that recipients are not prohibited from taking affirmative action "to overcome the effects of conditions which resulted in limited program participation by persons of a particular race, color, or national origin," 38 Fed. Reg. 17978 (July 5, 1973). The illustrative applications also added to the regulations make it clear that affirmative action is clearly intended to mean that special consideration will be given to minority applicants. For instance, amended section 80.5(i) provides that it may be necessary for a recipient to make "selections which will insure that groups previously subjected to discrimination are adequately served." 38 Fed. Reg. at 17980-81. Section 80.5(j) provides that even if a recipient has never used discriminatory policies, it

[21]The second section of 80.3(b)(6) states that a recipient of federal funds "may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin . . ." even if it has not engaged in prior discrimination.

"may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served." 38 Fed. Reg. at 17981.

Since Title VI, as implemented by federal regulations, required the University to take affirmative action to remedy the discriminatory effects of its admissions policy, it is irrelevant that there was no judicial finding that its prior admissions policies were illegally discriminatory. The regulations specify that the Act bars unjustified exclusion of minorities from institutions of higher education even when the discriminatory impact is unintended.

This Court recently held that discrimination in effect burdening national origin minority children violates Title VI. *Lau v. Nichols*, 42 USLW at 4167. *Lau* dealt with a policy, nondiscriminatory on its face, that discriminated in practice against Asian children. Similarly, in the instant case, the Law School's former admissions criteria, while purporting to treat all applicants alike, seriously discriminated against minority applicants. Just as this Court required the school system to take neutralizing action in *Lau* to overcome the language barrier, so here the neutralizing action taken by the Law School—the special admissions program—must be upheld. The regulations implementing Title VI contain explicit directives defining affirmative steps recipients should voluntarily undertake to prevent illegal discrimination and rectify the effects of past discrimination. The Law School has taken such steps. This Court should

thus defer to HEW's construction of the statute on this point,[22] and uphold the Law School's policies.

In this case, it would be particularly anomalous to hold that affirmative action taken by the University of Washington Law School is unjustified. The Law School's admissions process is governed directly by Title VI and indirectly by the rule in *Griggs v. Duke Power Co.* Both Title VI and Title VII as construed by the courts and administrative agencies include strong prohibitions on unexplained de facto discriminations against minority groups. In *Griggs* and *Lau,* this Court upheld this construction of these two statutes. Both statutes also include potent affirmative action requirements which can be imposed by a court or administrative agency in default of voluntary efforts at affirmative action. These provisions have also been upheld. [*See* cases cited in section II(B) *infra.*] Since the fundamental premise of both statutes is the encouragement of voluntary compliance, this Court should uphold the Law School's minority admissions policy as a valid attempt to comply with its legal obligations.

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[22]This Court has consistently given great deference to the interpretation of a statute by the officers or agency charged with its administration. *Griggs v. Duke Power Co.,* 401 U.S. 424, 433-34 (1971); *Udall v. Talman,* 380 U.S. 1, 16 (1965). The validity of an administrative regulation will be upheld if it is reasonably related to the purpose of the enabling legislation. Here, as in *Lau v. Nichols,* the applicable enabling legislation is section 601 of the Civil Rights Act of 1964. It should be noted that these interpretative regulations are uniform rules which have been adopted by every federal agency which extends federal financial assistance.

**B. The Law School's use of the minority admissions program to remedy the discriminatory effects of its entry criteria was a constitutionally permissible exercise of its discretion.**

**1. Racial classifications can be used to remedy past and present racial discrimination.**

In repeatedly characterizing this case as a minority preference case, petitioner totally overlooks the fact that the so-called "special privilege" involved here is nothing more than a neutralizing of the racially discriminatory effect of entry criteria which in the past caused an almost complete segregation of the Law School, and which would still do so without the minority admissions program. There are literally hundreds of cases which support the proposition that racial classifications can be used in order to provide a remedy for prior and continuing discrimination burdening minority groups.[23] Since this case involves the use of a racial classification by a public agency, we will limit our citations to cases in which public agencies were ordered to use racial classifications to remedy the effects of their past and present discrimination. *See, e.g., Carter v. Gallagher,* 452 F.2d 327 (8th Cir.) *(en banc), cert. denied,* 406 U.S. 950 (1972); *Castro v. Beecher,* 459 F.2d 727 (1st Cir. 1972); *Pennsylvania v. O'Neill,* 348 F. Supp. 1084 (E.D. Pa. 1972), *modified en banc,* 473 F.2d 1029 (3d Cir. 1973); *Bridgeport Guardians v. Bridgeport Civil Service Commission,* 482 F.2d 1333 (2d Cir. 1973); *Vulcan Society v. Civil Service Commission,* 6 E.P.D.

[23] The courts have, in fact, held that racial classifications may be mandatory if necessary to prevent racial discrimination. *See, e.g., Norwalk CORE v. Norwalk Redevelopment Agency,* 395 F.2d 920 (2d Cir. 1968).

¶ 8974 (2d Cir. 1973); *Coffey v. Braddy,* No. 71-44-Civ.-J (M.D. Fla., August 12, 1971); *NAACP v. Allen,* 340 F. Supp. 703 (M.D. Ala. 1972); *Hogue v. Bach,* No. C-3693 (D. Colo. 1972); *Shield Club v. City of Cleveland,* 5 E.P.D. ¶ 8406 (N.D. Ohio 1972); *Pennsylvania v. Sebastian,* No. 72-987 (W.D. Pa., Nov. 20, 1972), *aff'd by order* (3d Cir., June 7, 1973); *Davis v. County of Los Angeles,* 73-63-WPG (C.D. Cal., July 20, 1973); *Erie Human Relations Commission v. Tullio,* 360 F. Supp. 628 (W.D. Pa. 1973); *Arnold v. Ballard,* 6 E.P.D. ¶ 8675 (N.D. Ohio 1973); *NAACP v. Civil Service Commission of San Francisco,* 6 E.P.D. ¶ 8956 (N.D. Cal. 1973); *Western Addition Community Organization v. Alioto,* 6 E.P.D. ¶ 8959 (N.D. Cal. 1973).

The implicit rationale of these cases is that racial classifications which are used to rectify racial discrimination and achieve equality are obviously not denials of the equal protection of the laws. In each of these cases the court imposed a hiring ratio establishing minimum percentages for the employment of minority applicants. Every case acknowledged that such a remedy would impose short-term burdens on some competing whites, and that applicants from specific minority groups would be given special consideration. Nevertheless, this special consideration given to minority aspirants did not transgress the rights of competing whites to equal protection of the laws.

**2. Public agencies may take reasonable actions to rectify their own discriminatory practices without a judicial finding of illegal discrimination.**

Although in most instances the remedies imposed in the above cited cases were ordered after a judicial finding of illegal discrimination, the law does not restrict the use of remedial racial classifications to situations where such findings have been made. In *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971) this Court stated that, although the judicial power to remedy the effects of discrimination rests on a finding of statutory or constitutional violation, other government agencies have the authority to take affirmative action to remedy the effects of state policies that are discriminatory in fact, even in the absence of a specific finding of prior racial discrimination. As the Court put it:

> School authorities are traditionally charged with broad power to formulate and implement education policy and might well conclude for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; . . . 402 U.S. at 16.

Consistent with *Swann,* the court in *Associated General Contractors of Massachusetts, Inc. v. Altshuler,* 6 E.P.D. ¶ 8993 (1st Cir., November 30, 1973) recently upheld a voluntarily adopted affirmative action program, stating that:

> [P]ublic authorities have a broader discretionary power to remedy past discrimination than that of the judicial branch. *Id.* at 13.

The statements by the courts in *Swann* and *Altshuler* confirm the fundamental legal principle that public agencies have constitutional authority to enact affirmative policies that will ensure equal treatment, even though there may be no prior finding of illegal discrimination. *Cf. Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966). *See also, Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

Further support for this fundamental principle can be found in two other lines of cases. The first is a series of cases upholding affirmative action programs adopted by federal and state agencies. The second is the enormous body of Title VII and equal protection clause cases in which consent agreements have been approved by district courts in the absence of specific findings concerning discrimination.

In a series of cases the courts have upheld affirmative action plans that set hiring goals or ratios for minority tradesmen in state or federally financed construction projects. Although these plans require that contractors give special consideration to minority groups when making hiring decisions, they have been consistently upheld against challenges on equal protection grounds. None of the plans was predicated on a specific finding of past illegal discrimination by contractors.[24] Each plan was designed to rectify the

[24]While each of these plans was adopted after an administrative finding that minority tradesmen were significantly underrepresented on construction projects, such a finding was no more than what was

racial imbalance then existing on construction projects, and the reviewing courts recognized that this interest was sufficiently important to justify the "color conscious" solution. For instance, in *Associated General Contractors of Massachusetts, Inc. v. Altshuler,* 6 E.P.D. ¶ 8993 (1st Cir. Nov. 30, 1973), the court said:

> It is by now well understood . . . that our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term. After centuries of viewing through colored lenses, eyes do not quickly adjust when the lenses are removed. Discrimination has a way of perpetuating itself, albeit unintentionally, because the resulting inequities make new opportunities less accessible. *Id.* at 11.

*See, Contractor's Association of Eastern Pennsylvania v. Secretary of Labor,* 442 F.2d 159, 173 (3d Cir.) *cert. denied,* 404 U.S. 854 (1971); *Southern Illinois Builders Association v. Ogilvie,* 327 F. Supp. 1154 (S.D. Ill. 1971) *aff'd* 471 F.2d 680, 684 (7th Cir. 1972); *Joyce v. McCrane,* 320 F. Supp. 1284 (D. N.J. 1970); *Weiner v. Cuyohoga Community College District,* 19 Ohio 2d 35, 249 N.E.2d 907, 908 (1969), *cert. denied,* 396 U.S. 1004 (1970). *Cf. Brooks v. Beto,* 366 F.2d 1 (5th Cir. 1966); *Porcelli v. Titus,* 431 F.2d 1254 (3d Cir. 1970).

Each of these cases is materially indistinguishable from the present action. The Law School has recognized the crucial need to alleviate the underrepresen-

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patently obvious to the University of Washington Law School, i.e., the almost total exclusion of racial minorities from its own student body as well as from the legal profession.

tation of minority lawyers in the legal profession and to neutralize the exclusionary effects of its traditional admissions criteria. It responded appropriately. The Law School modified its admissions policies in an attempt to remedy these evils.

A further indication that public agencies may rectify their discriminatory practices without a judicial finding of illegal discrimination can be found in the judicial approval of consent agreements which require an employer to use racial hiring ratios to eliminate the effects of discrimination. *See, e.g., Penn. v. Stumph,* C-69-239-06JCL (N.D. Cal., Dec. 20, 1973); *Emeryville Citizens for Better Government v. Neary,* C-71-940 CBR (N.D. Cal., Oct. 26, 1973); *NAACP v. Imperial County Irrigation District,* No. 60-302-GT (S.D. Cal. 1972); *Martinez v. Grand Rapids Civil Service Board,* No. G-178-72, 6 Clr. Hs. Rev. 685 (W.D. Mich., Jan. 22, 1973); *United States v. Operating Engineers, Local 3,* C-71-1277 RFP (N.D. Cal. 1973).

In each of these cases, most of which involved public agencies, the parties consented to hiring ratios without any judicial finding that the employer's hiring policies were in fact illegally discriminatory. Evidence that the challenged hiring procedures seriously disadvantaged minority applicants was deemed sufficient to justify judicial approval. Likewise, in the present action, the severe disadvantage caused to minority applicants by the Law School's entry criteria should justify its adoption of a program designed to rectify that disadvantage.

**3. A decision not to allow public agencies substantial discretion to rectify their discriminatory practices would be a decision to perpetuate such practices.**

The importance of preserving and encouraging the authority of public agencies to remedy present and past discrimination cannot be overemphasized. For decades, the Executive Branch has attempted to eliminate racial discrimination in employment through affirmative action requirements in its federal contracts. *See, e.g.,* Executive Order 11246. More recently, affirmative action programs have been adopted by federal, state, and local agencies throughout the country to remedy the effect of racial discrimination in employment, admissions to schools, housing, the distribution of teachers and students within schools, and many other areas. The discretion of these agencies to adopt and implement such programs must be encouraged if equal treatment for racial minorities in our society is ever to become a reality. Restriction of this discretion would not only slow progress in civil rights to a snail's pace, but would in fact result in the perpetuation of past discrimination.

A further effect of restricting the discretion of public agencies would be to impose an enormous burden on the already overburdened judicial system. It would result in the bringing of a large number of lawsuits which are wholly unnecessary since many agencies are willing to rectify their own discriminatory practices without a court order. Moreover, those agencies which are willing to take affirmative action to rectify the effects of their discriminatory practices are better equipped than the courts to determine the

specific causes of the discrimination and the best means to compensate for it. This is the reason courts ordinarily grant substantial deference to the judgment of the executive and legislative branches. We suggest that such deference is fully appropriate here.

The Constitution mandates equal protection, not color blindness. Measures, such as those adopted by the Law School, which seek to promote, rather than to deny equal treatment, should not be deemed illegally discriminatory. Fruend, *Constitutional Dilemmas,* 45 B.U.L. Rev. 13, 20 (1965). As shown above §§B(2),(3) *supra,* Congress, in both Title VI and Title VII of the Civil Rights Act of 1964, has condemned unexplained and unjustified discriminations burdening racial minorities. These statutes also express a strong Congressional commitment to the principle of voluntary compliance and the necessity for affirmative action aimed at eliminating the effects of past and present discrimination. This Court has given extraordinary deference to Congress' judgment about the need to enact such measures in order to secure equal protection. *Cf. Katzenbach v. Morgan,* 384 U.S. 641 (1966). *See also United States v. Guest,* 383 U.S. 745 (1966); *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964). Thus, Congress retains broad authority to enact laws designed to correct conditions perceived to involve a denial of equality or other fourteenth amendment rights; the Court defers to the presumed need for a remedy, without requiring a showing of actual discrimination. By the same token, state agencies should retain authority to prescribe remedies to implement the guarantees of the four-

teenth amendment and federal antidiscrimination legislation, even though there has been no specific judicial finding that these laws have been violated.

**C. The traditional presumption of unconstitutionality does not apply to an ameliorative racial classification challenged as a discrimination burdening whites.**

In the foregoing portions of this brief, we have demonstrated (1) that it is wholly incorrect to characterize this case as one involving preference or special privileges for nonwhite persons, (2) that indeed it is petitioner who asks this Court to grant an illegal preference for whites over nonwhites and (3) that the racial classification does not involve the granting of a preference since it is used solely to remedy the adverse impact of the Law School's entry criteria on nonwhites. In this section of the brief we will assume solely for purposes of argument that the Law School's minority admissions program does grant a "preference" to nonwhites and therefore involves a discrimination burdening some whites, and we will show that, even if this were so, it would be fully constitutional. The fundamental proposition on which this argument rests is that the racial classification in this case is not the type of suspect racial classification to which the presumption of unconstitutionality applies. Consequently, the Court should not require the Law School to demonstrate that the admissions program is necessary to achieve a compelling state interest. Rather, a less strict standard of review is appropriate. Since the minority admissions program is a rational means to achieve a legitimate state interest, it is wholly legal.

This Court has traditionally applied a strong presumption of unconstitutionality to classifications that are challenged as discriminating against, excluding, stigmatizing or otherwise burdening certain groups that need special judicial protection. *See, e.g., McLaughlin v. Florida,* 379 U.S. 184, 192 (1964); *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954). This presumption is founded upon the indisputable premise that racial classifications have been used in the past mainly to the detriment of minority groups that have been victimized by state sanctioned discrimination and relegated to a position of political impotence. Were it not for the extraordinary protection afforded by the judiciary through the presumption of unconstitutionality ordinarily applied to racial classifications, these groups would have no possible way to redress their legitimate grievances. When, however, the complaint is that whites are burdened by government action which makes racial distinctions in order to ameliorate burdens suffered by members of a minority race, the traditional rationale for stringent review does not apply. For the reasons discussed below, the presumption of unconstitutionality is unwarranted in this case.

**1. The minority admissions program does not burden a minority group traditionally subjected to private and public discrimination.**

The major purpose of the fourteenth amendment was to safeguard blacks against discriminatory state laws. *Palmer v. Thompson,* 403 U.S. 217 (1971); *Strauder v. West Virginia,* 100 U.S. 303 (1880);

*Slaughter-House Cases*, 83 U.S. 36 (1873). Consistent with this purpose, a basic function of the presumption of unconstitutionality has been to protect groups that have historically been victims of private prejudice and animosity from invidious legislation directed against them. *Cf. Hernandez v. Texas*, 347 U.S. 475, 478 (1954). Racial classifications, when they have been used, all too often have reflected historic prejudices, rather than legislative rationality. Their purpose has virtually always been the preservation of white supremacy and the subjugation of minority groups into an inferior civil status. Their effect has virtually always been to stigmatize and degrade the minority group. Thus, the judiciary, as the guardian of individual rights, has closely scrutinized racial classifications.

This heightened judicial sensitivity has been particularly necessary because invidious racial classifications have so often been facially neutral: much racial legislation has been ostensibly evenhanded, but on closer view, has stigmatized, subjugated, and damaged only the minority group. *See, e.g., Wright v. Council of the City of Emporia*, 407 U.S. 451, 461 (1972); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Loving v. Virginia*, 388 U.S. 1 (1967); *Brown v. Board of Education*, 347 U.S. 483, 494 (1954). Because even supposedly neutral racial classifications used by the state frequently invidiously discriminate against minority groups, the Court has properly shifted to the state the burden of justifying the use of these classifications.

The white majority, however, does not need this protection. It has not been subjected to historic discrimination or victimized by private prejudice. Affirmative action programs such as the Law School's minority admissions policy obviously do not stem from racial antipathy, and their purpose is not to oppress any racial group. Furthermore, such special consideration given minority applicants does not compound the burdens imposed by the historical legacy of slavery, segregation and discrimination. This is not a classification that seizes on a group that has historically suffered discrimination and which relies on this past discrimination as an excuse for heaping on additional disadvantages. Instead it seeks to alleviate these burdens. *Cf. Gruenwald v. Gardner,* 309 F.2d 591 (2d Cir.), *cert. denied,* 393 U.S. 982 (1968).

**2. The minority admissions program does not burden politically powerless insular minorities.**

Another function of strict equal protection review has been to protect politically weak minority groups from class distinctions directed against them through the majoritarian political system. Recently, the Court noted that one of the traditional indicia of suspectness is that the class is "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process" *San Antonio School District v. Rodriguez,* 411 U.S. 1, 28 (1973). Potential abuse of the legislative process by the majority has been a crucial factor that has invited close judicial scrutiny of legislation that may discriminate against "discrete and insular" minorities

which are relatively powerless to protect their interests by resort to the political branches. *Graham v. Richardson,* 403 U.S. 365, 372 (1971).

Discrimination burdening insular minorities will not evoke the political response that the majority can rely upon to protect its interests from invidious legislation. *United States v. Carolene Products,* 304 U.S. 144, 153 at n.4 (1938). Further, when a minority group complains that it is peculiarly damaged by certain legislation, the judiciary must listen closely because the minority did not have a hand in making the decisions involved. Indeed, a foundation for the illegality of segregation laws is that they are imposed on "the group that is not dominant politically, and therefore, does not make the choice involved." Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 Harv. L. Rev. 1, 33 (1959). Often, therefore, the judicial branch has offered minority groups their only hope for redressing their legitimate grievances.

Thus, this Court has found that heightened judicial solicitude is appropriate when reviewing legislation affecting aliens, who are unable to vote [*Graham v. Richardson,* 403 U.S. 365 (1971)], blacks, who have historically been excluded from the political process [*Nixon v. Herndon,* 273 U.S. 536 (1927); *Gaston County v. United States,* 395 U.S. 285 (1966)], and women, who face pervasive discrimination in the political arena, [*Frontiero v. Richardson,* 411 U.S. 677, 685 n.17 (1973) (plurality)]. Consequently, when the political or administrative process has oppressed

protected minority groups, denied them equal treatment, or ignored their needs, the judiciary has taken an active role in safeguarding the minority from the depredations of the majority, *Hunter v. Erickson,* 393 U.S. 389 (1969). In contrast, the deference the Court affords most economic and social regulatory legislation is largely attributable to the simple fact that the interest groups that are burdened have "more than enough power to protect themselves in the legislative halls." *Dandridge v. Williams,* 397 U.S. 471, 520 (1970) (dissenting opinion).

As Justice Powell put it in a recent case in which the Court refused to extend further the concept of suspect classes:

> The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. *San Antonio School District v. Rodriguez,* 411 U.S. 1, 28 (1973).

Thus, when racial classifications are used amelioratively to rectify the effects of discrimination, as in the present case, the rationale for extraordinary judicial protection is inapplicable. The white majority has much less need for an alert judiciary that will guard it from invidious official action. The majority no more needs judicial protection from a law school admissions program assisting minority groups than

it needs to be protected from a special admissions program for foreign students, military veterans, the poor or the physically handicapped.[21]

As the Court stated in *Hunter v. Erickson,* in striking down an ordinance requiring antidiscrimination laws to be approved by referendum, "the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination, and if it did, a referendum might be bothersome, but no more than that." 393 U.S. 389, 391 (1969). The majority can, any time it feels that a governmental affirmative action program involves sacrifices it is unwilling to undertake, resort to the political process to obtain a remedy.

**3. The minority admissions program cannot be presumed to stigmatize racial minorities.**

Petitioner and several amici have argued that the Law School's minority admissions program will stig-

[21]The only element the challenged racial classification has in common with the classifications this Court has found presumptively unconstitutional is that an immutable trait, race, is the basis of the classification. However, this Court has never ruled that classification based on immutable traits are presumptively unconstitutional. *See, e.g., Labine v. Vincent,* 401 U.S. 532 (1971); *Levy v. Louisiana,* 391 U.S. 69 (1968). Moreover, in this instance race is in fact a relevant, and indeed a necessary, method of classification. *Cf. Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). There is therefore no reason to presume that this classification is manifestly arbitrary and unreasonable. Race may be the most rational way to classify when seeking to ensure against, rather than promote, discrimination. *Swann v. Charlotte-Mecklenburg Board of Education, supra; Norwalk CORE v. Norwalk Redevelopment Agency,* 395 F.2d 920 (2d Cir. 1968). *Springfield School Committee v. Barksdale,* 348 F.2d 261 (1st Cir. 1965). Since race is being used only as an effective measure to ameliorate discrimination in this case, there is no reason to presume that the classification is arbitrary and unreasonable.

matize minority students. In a fortunately bygone era, this Court described the white perception of blacks as: "... . beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect . . . a stigma of deepest degradation was fixed upon the whole race." *Scott v. Sanford* 60 U.S. 393 (1857).

In the day of *Dred Scott* the races were kept separate because blacks were considered "beings of an inferior order" and not fit to associate with the white race. The petitioner now stands the stigma rationale on its head and implies that the integration of what would otherwise be a virtually segregated law school through a minority admissions program will stigmatize black law students and lawyers with a stamp of inferiority. Minority students should not be foreclosed from a legal education simply because of the possibility that some whites might misunderstand the reasons for, and functions of, a minority admissions program.[25] A belief that minority lawyers are stigmatized solely because they are minorities and may have attended law school under the minority admissions program can only stem from racial prejudice which

[25]The assumption that students admitted through the minority admissions program are unqualified is totally erroneous. The Law School accepted no unqualified minority applicants; only those applicants "whose records indicated that they were capable of successfully completing the Law School program" were admitted. Any suspicion someone might harbor that these students are unqualified will quickly be dispelled since by the time these minority students are admitted to practice, they will have successfully completed the same curriculum as their white colleagues.

this Court should not condone. Traditionally law schools have had special admissions programs which give special consideration to veterans, the physically handicapped, and persons from various geographical areas. Not only have these students not been stigmatized, they have not been distinguished in any manner from the student body at large. If minority students are perceived any differently, racial prejudice can be the only explanation. The realistic view is that minority races would be stigmatized even more if there were only a few minority students allowed in law schools, and if there continue to be few minority lawyers.

Moreover, if the image conveyed by a minority admissions program is a social and psychological burden, it burdens minority students, not whites. As the potential victims of this burden, members of these groups are best able to evaluate the risks and decide whether they are willing to assume them. The notion that minority law students and lawyers will be burdened by a minority admissions policy is especially ironic when one considers that special admissions programs, which now exist in law schools throughout the country, in most cases were established and survive with strong support from minority students and the minority bar.

Since there is little danger that state policy seeking to assist minority groups will become oppressive and invidious if the judiciary does not closely safeguard the rights of the majority, there is no reason for adhering to the presumption of unconstitutional-

ity traditionally applied in other cases involving racial classifications. Of course, this does not mean the total abandonment of judicial review in cases such as this. It only means that the Court should not require the Law School to demonstrate that its minority admissions program is necessary to the achievement of a compelling state interest. Under the applicable standard of review, the rational basis test, it is clear that the minority admissions program is constitutionally permissible. *See* Sec. I(C), *supra.* Indeed, as the following discussion will establish, the minority admissions program is supported by a compelling state interest.

**D. Even if a compelling state interest is the standard by which the University's actions are to be measured, the University had such an interest.**

Even if this Court should reject each of the arguments presented in the foregoing sections of this brief, and characterize the racial classification in this case as suspect, we would contend that the Law School's admissions program is justified by a compelling state interest.[26] Indeed, the admissions policy is justified by probably the single most important domestic interest: the need to establish and maintain racial harmony among the people of the United States. During the 1960's racial tension throughout the nation

[26]We recognize that this Court may in this case apply a standard of review less stringent than the compelling state interest test, yet require a stronger showing of the rationality of the classification and the strength of the interest served than is ordinarily demanded by the rational basis test. However, we will show that the Law School's admissions policy passes muster under the compelling State interest analysis, as well as any less rigorous standard of review.

exploded into prominence as the single most dangerous, destructive and intractable domestic problem facing this nation. The Law School's minority admissions program represents an attempt to respond to this fundamental issue.

In civilized nations governments are established in large part to secure the peaceful resolution of clashes between conflicting individuals and interest groups. The legal system, in particular, is assigned the fundamental task of ensuring that conflicts are resolved in a peaceful manner. When entire racial groups are systematically excluded from positions within the legal system, the result is easy to predict. The excluded group will feel alienated from the system, and its legitimacy decreased in their eyes. They will perceive that the system suppresses them, and responds fairly only to the dominant racial group. Bell, *Racism in American Courts, Cause for Black Disruption or Despair?* 61 Calif. L. Rev. 165, 174-84 (1973). Ultimately, this diminution of perceived legitimacy can only result in resort to direct action by excluded groups outside the legal and political system to secure a forum for their demands and concerns.

At this time in history, it seems particularly ironic to argue before this Court that the State of Washington does not have a compelling interest in the development of programs designed to overcome the exclusion of the nonwhite races from the legal profession. The interests involved are precisely the most fundamental interests of all state and local

governments. Individuals may differ about the specific steps that should be taken in the pursuit of these fundamental and compelling governmental interests, but it takes a substantial degree of blindness to argue that the interest does not exist.

Of course, judicial review of suspect classifications is not exhausted by a showing of a compelling need for some governmental action. It must also be shown that the classification is a rational means to achieve that interest, and does not impose unnecessary burdens. Even within these strict limits, however, the state's action in this case is constitutional, since there is no alternative available to the state for integrating the legal profession other than by ensuring that minorities are trained for the profession at the state law schools. Thus, even if the racial classification involved in this case is reviewed under this Court's most stringent standard, the minority admissions program still meets this test. This was the finding of the Washington Supreme Court, and it is wholly correct.

Petitioner has taken the position that the Supreme Court of the State of Washington was in error in characterizing the need for additional minority law students and, ultimately, attorneys, as a compelling state interest. He has incorrectly characterized the Law School's interest in increasing the number of minority lawyers as stemming primarily from the belief that minority lawyers provide better representation for minority clients. Phrased this way, petitioner's view of the problem is too narrow. In

many individual lawyer-client relationships the race of the lawyer is undoubtedly irrelevant, but it can hardly be disputed that the rights of minority groups will be better protected if there are more minority attorneys. This is especially true in those situations in which racial discrimination is involved, or in cases in which it might be unpopular for white attorneys to represent minority clients.

The national need for minority lawyers goes far beyond whatever need minority clients have to be represented by attorneys of their own race. It is the *sine qua non,* extensively documented by the Kerner Commission in 1968 [Report of the National Advisory Commission on Civil Disorders 283-88], of full integration at every level of society, because it concerns access to positions of political and economic power where policy-making and the decisional process affect the lives of all citizens. Those cases that have come before the Court in the areas of school desegregation, employment and public accommodations, as well as the extensive civil rights legislation of the last ten years, have all been directed toward bringing about a fully integrated society. Other cases involving reapportionment, voting rights and jury selection have been recognized by the Court as affecting the ability of minorities to obtain a fair parity of political and economic power in our society.

As we have argued earlier, the legal profession plays a critical role in the public and private policy-making sectors of our society. *See* §II(A)(1), *supra.* Yet, minorities are vastly underrepresented

in these sectors. Among the nation's approximately 300,000 lawyers, roughly 4,000—less than 1½ percent —are black. There are only 16 blacks in the House of Representatives and one in the Senate. Significantly, over 40 percent of these black legislators are lawyers. On the basis of evidence such as that provided by the record in this case relating to the University of Washington Law School's past admissions' practices, without a minority admissions program racial minorities may never be fully integrated into the legal profession or the major policy-making positions in this society.

The Supreme Court of the State of Washington found that there were compelling educational reasons for having a racially integrated law school student body. The University recognized, as has this Court, that an all white law school damages not only minorities, it also harms white students who are deprived of the benefits of a racially integrated learning experience. *Cf. Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972). This Court recognized the educational benefits of a racially integrated law school in *Sweatt v. Painter*, 339 U.S. 629 (1950) in which the Court, said:

> The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students, and no one who has practiced law, could choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. *Id.* at 634.

Racial isolation in law school can only buttress racial prejudices and stereotypes which will be carried over into professional life. The legal profession can little afford lawyers who have been isolated from other races, other cultures, and other ideas.

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## CONCLUSION

For the reasons set out above, as well as those stated by the Respondents and other *amici* in support of their position, the decision below should be affirmed.

Dated, Oakland, California,
January 29, 1974.

Respectfully submitted,

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